

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 27

30 MAY 2014

IN VIEW OF

- The Minutes of the First Session of 10 April 2008;
- Procedural Orders No. 2 of 1 December 2009 and No. 3 of 27 January 2010;
- ICSID's letters of 21 May 2009 and 2 June 2009 regarding, among others, the conduct of the hearing on jurisdiction;
- ICSID's letter of 6 May 2014 in relation to the upcoming hearing;
- Claimants' letter of 12 May 2014, in which they requested that the Tribunal (i) strike certain exhibits from the record; and (ii) direct Respondent to refile its Rejoinder without reference to the excluded materials, and Respondent's response thereto of 19 May 2014;
- The Parties' respective letters of 13 May 2014 in which they each provided the list of witnesses to be called for examination at the hearing;
- The Parties' respective letters of 20 May 2014 in which the each commented upon the other Parties' list of witnesses called for examination at the hearing;
- Respondent's letter of 21 May 2014, in which it objected to Claimants' modification of its list of witnesses;
- Claimants' letter of 22 May 2014 responding to Respondent's objection;
- Respondent's letter of 28 May 2014 and Claimants' letter of 29 May 2014 requesting a ruling on the pending issues;

1. WITH REGARD TO CLAIMANTS' REQUEST FOR EXCLUSION OF MATERIALS FILED BY RESPONDENT WITH ITS REJOINDER

CONSIDERING

- that, in their letter of 12 May 2014, Claimants identified ten expert reports and eight transcripts of expert hearing testimony from outside arbitrations filed in Respondent's Exhibits RE-736, RE-775 and RE-776 and a '35-page exhibit' filed as RE-812, which Claimants consider to have been filed in breach of the principles set out in Procedural Order No. 3;
- that, in particular, Claimants contend that (i) the expert materials are being used out of context and their content does not apply to the present proceedings, (ii) the full materials of the relevant case in which these expert materials have been produced are not accessible to all parties, and that (iii) they are unnecessary to challenge, if Respondent so intends, the credibility of the experts called in the present proceedings given the experts' publicly available works and written and oral testimony in this proceeding;
- that Respondent contends that the circumstances concerning the Exhibits challenged by Claimants in their 12 May 2014 letter is partly different from that

of the documents covered by Procedural Order No. 3, and, in particular, that the principles set out in Procedural Order No. 3 only apply to ‘legal experts’ and not to financial experts;

- that, with regard to the specific Exhibits concerned, Respondent argues as follows:
 - (i) As concerns RE-736, it contains a compilation of documents showing the inconsistencies including a document prepared by the Treasury Attorney-General’s Office and some supporting appendices. Out of these appendices, only appendix RE-736.1 contains reports submitted in other arbitrations. The other appendices, namely RE-736.2 to RE-736.34 contain newspaper articles, papers and different publications, which are not covered by Procedural Order No. 3. Firstly, these Exhibits refer to financial rather than legal experts, and are thus not covered by Procedural Order No. 3. Alternatively, should the Arbitral Tribunal consider that Procedural Order No. 3 also applies to financial experts, it would in any case only apply to RE 736.1 and not to the remaining Exhibits of RE-736;
 - (ii) As concerns RE-775, which consists of an expert report issued by Prof. Bianchi in another arbitration proceeding against the Argentine Republic, Respondent accepts that it be excluded;
 - (iii) As concerns RE-776, which consists of hearing testimony transcripts from Mr. Guidotti in another arbitration proceeding against the Argentine Republic, Respondent contends that it refers to financial rather than legal expertise and is therefore not covered by Procedural Order No. 3;
 - (iv) As concerns RE-812, which consists of a report issued by Navigant in the case of TECO Guatemala Holdings LLC v. Republic of Guatemala, which is not only publicly available but further refers to valuation rather than legal expertise, and is therefore not covered by Procedural Order No. 3;

CONSIDERING FURTHER

- that, according to Rule 34(1) of the ICSID Arbitration Rules “[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value”, and the Tribunal has thus the power to decide on the admissibility of the Exhibits at stake;
- that, in Procedural Order No. 3, the Tribunal dealt with the standard of confidentiality to apply to the record of the present proceedings and incidentally also dealt with the admissibility of specific exhibits submitted by Respondent which Claimants sought to exclude from the record;
- that the exhibits covered by Procedural Order No. 3 included expert reports rendered by Prof. Christoph Schreuer, Prof. Rudolf Dolzer, Prof. Michael W. Reisman and Prof. Hector Mairal and transcripts of such experts’ oral testimony given in other arbitration proceedings;

- that the Tribunal considered that it could not simply apply the same standard of confidentiality as applicable in the present proceedings and therefore examined each exhibit to determine its admissibility (para. 139 of Procedural Order No. 3);
- that, in order to decide on the admissibility of these documents, the Arbitral Tribunal found it necessary to balance Respondent's right of defense, including its right to challenge the credibility of any expert or witness, with (i) Claimants' right to equality of arms, and (ii) the general interest in ensuring the integrity of the procedure and in particular the finding of the truth;
- that the Arbitral Tribunal considered it appropriate to exclude such expert materials from the record based on the following main reasoning:
 - (i) that they concerned expert material issued in different proceedings, relating to different disputes and subject to different laws, and that, consequently, specific considerations expressed in the relevant expert reports or examination transcripts could not be transposed one to one to the present proceedings, and that this exercise would not only be a very time consuming exercise, but also a very delicate and difficult one, since the full records of those proceedings are not freely accessible to the Claimants and the Tribunal (paras. 145-147 of Procedural Order No. 3);
 - (ii) that it appeared that the exhibits at stake would be used in the first place for "impeachment purposes" and not to shed more light on the legal issues at stake (para. 148 of Procedural Order No. 3); and
 - (iii) that the four experts concerned by those exhibits were all Professors of law having published a variety of books and articles, in which their general position on certain relevant issues are laid down, and that these publicly available documents together with the specific expert reports issued by the relevant experts in the present proceedings and Respondent's accumulated experience in previous arbitration proceedings involving such experts should be sufficient to allow Respondent to challenge the experts' credibility where deemed appropriate, so that it was not necessary to further refer to specific documents issued in other arbitration proceedings (paras. 149-150 of Procedural Order No. 3);
- that although the experts at stake in Procedural Order No. 3 happened to be legal experts, the legal nature of the expertise was not a determining factor;
- that, as such, the mere fact that certain of the Exhibits currently at stake, i.e. RE-736, RE-776 and RE-812, do not concern legal experts is irrelevant and the question is whether the inclusion of such Exhibits into the record undermines the equality of arms;

CONSIDERING FURTHER

(i) As concerns RE-775

- that RE-775 consists of a legal expert report of Prof. Bianchi issued in another arbitration and that Respondent has accepted that it be excluded;
- that RE-775 shall therefore be excluded;

(ii) As concerns RE-736

- that RE-736 consists of a 35-page memorandum written in Spanish and called “*Inconsistencias de los Expertos de la Contra-Parte*” and accompanied by 34 annexes including (i) an expert report and extracts of transcripts from testimony given by Prof. Edwards in another arbitration proceeding (RE-736.1), and (ii) a series of publicly available publications, including publications written by or involving Prof. Edwards, Mr. Guidotti and Prof. Cottani (RE-736.2 to 34);
- that the 35-page memorandum appears to be a pleading drafted by Respondent and is therefore of the same nature and should be considered part of the Rejoinder;
- that such document should however be translated into English in accordance with para. 7 of the Minutes of the First Session;
- that RE-736.2 to RE-736.34 are all publicly available publications, which Respondent is entitled to include in its Rejoinder submission;
- that as concerns the expert report and transcript of Prof. Edwards, i.e. RE-736.1, the principles set out in Procedural Order No. 3 regarding expert testimony given in other arbitration proceedings apply;
- that, in particular, the case in which Prof. Edwards issued his testimony involves a different Claimant and the dispute is based on a different legal framework, although the general and economical context of the dispute in which Prof. Edwards gave his testimony may bear certain similarities to the context of the present dispute;
- that, except for the decision on jurisdiction, other evidence or documents issued in the other arbitration proceeding is not publicly available or accessible to Claimants;
- that it appears that Respondent’s main purpose in requesting the inclusion of this Exhibit is to challenge the credibility of Claimants’ experts and not to shed more light on crucial issues relating to the sale of bonds;
- that in view of the testimony given by Respondent’s own experts in this arbitration proceeding, Respondent’s accumulated experience in previous arbitration proceedings involving Prof. Edwards, the various publications filed as RE-736.2 to 736.34 and Prof. Edwards’ expert reports filed in the present proceedings, it does not appear necessary for Respondent, in order to challenge

Prof. Edwards' credibility, to further refer to specific documents issued in other arbitration proceedings;

- that Respondent accepts to exclude RE-736.1 in the event that the Tribunal considers that expert reports and transcripts of expert testimony given in other arbitration proceedings should be excluded;
- that, consequently, RE-736.1 shall be excluded from the record, whereas the 35-page memorandum as well as RE-736.2 to 736.34 shall remain in the record;
- that Respondent shall provide Claimants with an English translation of the 35-page memorandum;

(i) As concerns RE-776

- that RE-776 consists of a transcript of oral testimony given by Mr. Guidotti, one of Claimants' experts, concerning the sale of bonds by Argentina, in another arbitration proceeding;
- that the principles set out in Procedural Order No. 3 regarding transcripts of expert testimony given in other arbitration proceedings apply also to the transcript of Mr. Guidotti's oral testimony;
- that, in particular, the case in which Mr. Guidotti issued his testimony involves a different Claimant and the dispute is based on a different legal framework, although the general historical and economical context of the dispute in which Mr. Guidotti gave his testimony may bear certain similarities to the context of the present dispute;
- that the proceeding from which Exhibit RE-776 has been extracted is subject to annulment proceedings;
- that other evidence or documents issued in the other arbitration proceeding is not publicly available or accessible to Claimants;
- that it appears that Respondent's main purpose in requesting the inclusion of this Exhibit is to challenge the credibility of Mr. Guidotti and not to shed more light on crucial issues relating to the sale of bonds;
- that in view of the testimony given by Respondent's own experts in this arbitration proceeding, Respondent's accumulated experience in previous arbitration proceedings involving Mr. Guidotti and Mr. Guidotti's expert report, it does not appear necessary for Respondent, in order to challenge Mr. Guidotti's credibility, to further refer to specific documents issued in other arbitration proceedings;
- that, consequently, RE-776 shall be excluded from the record;

(i) As concerns RE-812

- that RE-776 consists of an expert report issued by Navigant in another arbitration, i.e. TECO Guatemala Holdings LLC v. Republic of Guatemala ("TECO");

- that this report is publicly available on <http://portaldace.mineco.gob.gt/casos-guatemala>;
- that further expert reports and documents issued in the TECO case appear to be available on that very same website;
- that, in light thereof, the risk of out of context use of this report is limited;
- that this report, however, further concerned different parties, different issues and different calculations;
- that, therefore, the exercise of putting the relevant expert report back into its original context of the TECO case would be a time consuming and complicated exercise;
- that it appears that Respondent's main purpose in requesting the inclusion of that Exhibit is to challenge the credibility of Mr. Kaczmarek and not to shed more light on crucial issues relating to the sale of bonds;
- that the purpose of use of that Exhibit does not justify engaging in complicated exercises of comparison of reports issued in different proceedings, with different parties and different issues;
- that in view of the testimony given by Respondent's own experts in this arbitration proceeding, Respondent's accumulated experience in previous arbitration proceedings involving Mr. Kaczmarek and Mr. Kaczmarek's expert reports submitted in the present arbitration proceedings, it does not appear necessary for Respondent, in order to challenge Mr. Kaczmarek's credibility, to further refer to specific documents issued in other arbitration proceedings;
- that, consequently, RE-812 shall be excluded from the record;
- that Respondent shall refile its Rejoinder without references to the excluded materials by Friday 6 June 2014.

2. WITH REGARD TO THE PARTIES' LIST OF WITNESSES CALLED FOR EXAMINATION AT THE HEARING

CONSIDERING

a) In General

- that, in its letter of 6 May 2014, the Arbitral Tribunal invited the Parties to "*provide the Arbitral Tribunal and the other Party with the list of witnesses and/or experts which they intend to cross-examine*";
- that, in their letter of 13 May 2014, Claimants designated the following fact and expert witnesses for cross-examination at the hearing:
 - (i) As fact witnesses:
 - Ms. Noemi La Greca;

- Mr. Federico Carlos Molina;
- (ii) As expert witnesses:
 - Prof. Barry Eichengreen;
 - Messrs Saúl Keifman and Lucio Simpson;
 - Prof. Daniel Marx;
 - Prof. Roberto Mastroianni;
 - Mr. Ismael Mata;
 - Mr. Nouriel Roubini;
- that, in its letter of 13 May 2014, Respondent designated the following fact and expert witnesses for cross-examination at the hearing:
 - (i) As fact witnesses:
 - *“all of the Claimants listed at the time of submission of the Reply on Phase 2”*;
 - (ii) As expert witnesses:
 - Prof. Alberto Bianchi;
 - Dr. Joaquín A. Cottani;
 - Prof. Pablo E. Guidotti;
 - Mr. Brent Kaczmarek;
 - Mr. Ronald Morris, in the event that Claimants would call one of the experts proffered by the Argentine Republic in connection with issues related to the signatures and/or Database;
- that, in addition to designating witnesses for cross-examination, Respondent also requested the right to call witnesses for direct examination insofar as it requested the Tribunal to *“set a time limit for the parties to identify which of their own witnesses and experts not called by the other party they intend to examine”*;
- that, in its letter of 20 May 2014, Respondent stated that it had no observations to make with respect to the eight witnesses that Claimants intend to cross-examine, and requested the Arbitral Tribunal to establish that the Parties may not modify (either by dropping or adding witnesses or experts) the list of witnesses and experts called by the parties in their 13 May 2014 letters; at the same time, Respondent withdrew its cross-examination designation of Mr. Ronald Morris given that Claimants did not call Respondent’s experts on handwriting and/or Database issues;
- that, in their letter of 20 May 2014, Claimants objected to Respondent’s designation of “all of the Claimants” as witnesses for cross-examination and to

Respondent's request to designate witnesses for direct examination based mainly on the following arguments:

- that, **as concerns Respondent's request to cross-examine all of the Claimants**, Claimants contend that it is inadmissible because:
 - it is well-established in international arbitration that direct testimony is offered in the form of written statements, and cross-examination is limited to those individuals who provide direct testimony and only eight individual Claimants issued a witness statement in the present proceedings¹;
 - Respondent has chosen not to engage on issues as to individual Claimants, aside from a small number of cherry-picked Claimants that Respondent targeted in its written submissions, and Respondent has not offered any rebuttal evidence for any Claimant on the individual issues;
 - Respondent has not identified any specific issue for any specific Claimant for which cross-examination would assist;
 - allowing Respondent to cross-examine all of the Claimants would lead to a monopolization of the procedure, which would undermine Claimants' right to due process and that equal treatment of the parties – rather than limitless due process for just one party – must prevail in arbitration proceedings;
 - therefore any cross-examination by Respondent should be limited to the eight Claimants who issued witness statements;
- that Claimants further withdrew their cross-examination designations of Prof. Eichengreen, Prof. Roubini, and Prof. Mastroianni on the basis that Respondent failed to call any of Claimants' four economic experts or any of Claimants' Italian law experts on nationality and that a cross-examination of the above-mentioned experts by Claimants without a cross-examination of Claimants' counter-experts by Respondent would carry the risk of an imbalance presentation of key issues and evidence;
- that, **as concerns Respondent's request to call witnesses for direct-examination**, Claimants contend that it is not admissible under the standards applicable in the present proceedings, namely according to the ICSID letter dated 21 May 2009 and Procedural Order No. 2, and that, if direct examination were allowed, Claimants alone would be entitled to conduct direct examinations to address new issues in Respondent's Rejoinder;
- that, in the event that Respondent is permitted to call witnesses or experts for direct examination, Claimants will renew their requests to call additional individuals for direct examination, further to their 10 April 2014 letter requesting an opportunity to file a Sur-Reply which was denied by Procedural Order No. 25;

¹ Mr. Fabio Campiglia appears not to be a Claimant. (See Declaration Fabio Campiglia, ¶¶2 and 15).

- that, in its letter of 21 May 2014, Respondent objected to Claimants' withdrawal of their cross-examination designations of Prof. Eichengreen, Prof. Roubini, and Prof. Mastroianni based on the main argument that such withdrawal would breach the principle of simultaneous submissions of the Parties' lists of witnesses;

CONSIDERING FURTHER

- that, according to para. 16 of the Minutes of the First Session:

“The parties may adduce evidence by witnesses and experts. The statements, opinions or reports of such witnesses or experts should be submitted with the parties’ written submissions. Such statements, opinions or reports shall constitute the direct testimony of each witness or expert, as applicable. Each party may call its own witness or expert for direct examination, including as to issues arising in the Reply / Rejoinder phase that are not fully briefed. Each witness or expert may be called by either party or the Tribunal for cross-examination by the other Party at the oral hearing, if requested in writing no later than six (6) weeks in advance of the oral hearing”;
- that, in the letter of 21 May 2009 concerning the holding of the jurisdictional hearing, the Arbitral Tribunal decided as follows: *“4.1 [...] there will be no direct examination of witnesses or experts. The Respondent may, however, designate witnesses or experts whose statements have already been filed, and examine such persons limited, however, to any new factual or legal issue raised in the Claimants’ Rejoinder”;*
- that, in Procedural Order No. 2 of 1 December 2009, the Arbitral Tribunal admitted to a limited extent direct examination of certain expert witnesses, and indicated that the right to conduct such direct examination shall be limited to questions on new issues raised either in Claimants’ Rejoinder on Jurisdiction or specific issues raised during cross-examination and not already covered by existing reports;
- that, in its letter of 2 June 2009, the Arbitral Tribunal stated that *“[t]he Tribunal notes that according to § 16 of the Minutes of the First Session of 10 April 2008 a possibility for a Party to examine a person who had not submitted a statement, opinion or report, was not envisaged”* and therefore rejected Respondent’s request to cross-examine Mr. Nicola Stock, who had not submitted any witness statement;
- that, in view of the above, the standard applicable in the present proceedings is that (i) only witnesses having issued witness statements may be subject to cross-examination, and that (ii) direct examination shall only be allowed where it is necessary to address issues that have not been fully briefed;

b) With regard to Respondent's requests

CONSIDERING

(i) Cross-examination of Claimants' fact Witnesses

- that there are fourteen fact witnesses who submitted witness statements on behalf of Claimants. Eight of them are also individual Claimants, and the other six are "non-Claimants witnesses";
- that, as concerns the six non-Claimants witnesses (i.e., Baldi, Campiglia, Degrandi, Humes, Liebars and Serrani), Respondent has decided not to call any of them;
- that, as concerns the eight fact witnesses who are also Claimants (Abate, Alberti, Flagella, Nota, Pagliani, Pandolfo, Santi and Varone), to the extent that Respondent has requested the right to cross-examine "all Claimants", this includes these eight witnesses;
- that Respondent's alternative request is granted to the extent that it shall have the right to cross-examine these eight Claimants;
- that, for reasons of cost efficiency, such cross-examination may be conducted by video-conferencing.

(ii) Cross examination of Claimants' Experts

- that, as concerns the examination of Claimants' experts, Respondent has designated four experts of Claimants, and has withdrawn its designation of Mr Morris;
- that the withdrawal of Mr. Ronald Morris is accepted;
- that Respondent's current list of experts for cross-examination is thus composed of Messrs. Bianchi, Cottani, Guidotti and Kaczmarek;
- that these four experts may thus be cross-examined by Respondent;

(iii) Direct examination of Respondent's fact Witnesses and Experts

- that Respondent requests the right to examine some of its own witnesses and experts having previously submitted a witness statement or expert report, notwithstanding that Claimants have not requested to cross examine these witnesses or experts;
- that the total number of Respondent's fact witnesses in Phase 2 is six and the total number of experts is twelve;
- that the principle applied in this proceeding and which is also in line with common practice standards in international arbitration is that written witness statements or expert reports stand in lieu of direct examination;

- that the very purpose of requesting written witness statements and expert reports is to gain time and increase efficiency, and to avoid having to start at zero with direct examinations at the hearing and that allowing direct examination without regard to the prior submission of written witness statements and expert reports would undermine their very purpose;
- that therefore one Party's witnesses or experts shall in principle only be subject to direct examination if the opposing Party requests cross-examination of the concerned witness or expert;
- that exceptions to this principle may be warranted where special circumstances justify them;
- that such special circumstances may, for example, be given where new allegations or documents are submitted with the last written submission and the other party has no opportunity to react to such allegations other than through direct examination of one of its witnesses or experts;
- that further exceptions are sometimes admitted in practice with regard to expert testimony, where a short direct examination may serve to clarify complex aspects of expert reports;
- that the Arbitral Tribunal sees at this stage no special circumstances in the present case justifying to depart from the general principle, all the more that the last written submission was filed by Respondent and that Respondent would thus be given a further opportunity to respond to Claimants' previous submissions, which would risk the violation of Claimants' due process rights;
- that, therefore, if Respondent considers that there are special circumstances justifying a departure from the general principle, it shall file a written application listing the witnesses or experts it wishes to subject to direct examination and providing explanations as to the reasons why such direct examination is justified;
- that, in case the Arbitral Tribunal admits one or more of these requests, Claimants (who originally did not call such witnesses or experts for cross-examination) will be allowed to cross-examine them, if they so wish;

(iv) *Examination of Claimants who are not Witnesses*

- that, in addition, Respondent requests the right to cross-examine Claimants who have not submitted any witness statements and are thus not "witnesses" but rather parties;
- that, according to the principles applicable in these proceedings as set out in section 16 of the Minutes of the First Session and the Tribunal's directions of 21 May 2009, and which are also in line with common practice in international arbitration, cross-examination of witnesses is only admissible for witnesses who have submitted a witness statement;

- that persons who have not submitted any witness statement do not qualify as “witnesses” and therefore do not fall within the scope of the ICSID Arbitration Rules dealing with the examination of witnesses;
- that, consequently, there is no basis for Respondent to request to cross-examine Claimants who have not submitted any witness statement in this proceedings;
- that, therefore, Respondent’s request is rejected.

c) With regard to Claimants’ Requests

CONSIDERING

(i) Cross-examination of Respondent’s fact Witnesses and Experts

- that Claimants designated two fact witnesses for cross-examination including Ms. La Greca and Mr. Molina;
- that Respondent has not raised any objection to the designation of these fact witnesses, and that their cross-examination is therefore confirmed;
- that Claimants intended to examine six experts (i.e., Eichengreen, Keifmann/Simpson, Marx, Mastroianni, Mata and Roubini) and subsequently withdrew their request as concerns three of them (i.e., Eichengreen, Mastroianni and Roubini);
- that Respondent has objected to such withdrawal;
- that it is in the interest of the integrity of the proceedings that the key issues touched upon at the hearing be addressed by experts on both sides, in order to avoid a unilateral presentation of certain issues;
- that Respondent withdrew Mr. Ronald Morris from its cross-examination list for the very reason that Claimants did not call any of Respondent’s experts for cross-examination concerning handwriting;
- that it would therefore not be appropriate to refuse Claimants the same right with regard to experts, for whom they opine that Respondent has not designated any counter-experts for cross-examination;
- that, therefore, Claimants’ withdrawals of its request to call Prof. Eichengreen, Prof. Roubini, and Prof. Mastroianni is accepted.

(ii) Direct examination of Claimants’ fact Witnesses and Experts

- that, in case Respondent were to submit an application to conduct direct examination of its own witnesses or experts and if the Arbitral Tribunal were to grant such application, Claimants would be granted an equal right in accordance with the principle of equality of arms.

d) *With regard to the Individuals whom the Arbitral Tribunal wishes to question during the hearing*

CONSIDERING

- that the purpose of examination of witnesses at the hearing is to help the Arbitral Tribunal to better comprehend key issues addressed by the various experts;
- that, according to Rule 34 of the ICSID Arbitration Rules, the Arbitral Tribunal may, if it deems it necessary and at any stage of the proceeding, require a party to produce witnesses and experts;
- that the Arbitral Tribunal's right to call witnesses and/or experts for examination during the hearing is also specifically contemplated in para. 16 of the Minutes of the First Session;
- that, according to Rule 32(3) of the ICSID Arbitration Rules, “[t]he members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations”;
- that, consequently, the Arbitral Tribunal may require the Parties to produce witnesses and experts, and may put questions to the Parties, their agents and counsel and advocates;
- that based on this power, the Arbitral Tribunal chooses to call the following witnesses and experts for examination at the hearing, and to put questions to the following agents:
 - (i) Dr. Norbert Wühler, in his capacity as Tribunal expert;
 - (ii) Mr. Ted Bloch, in his capacity as Respondent's expert;
 - (iii) Mr. Nicola Stock, in his capacity as representative of TFA within the meaning of ICSID Arbitration Rules 18 and 32(3);
- that these three individuals shall first be questioned by the Arbitral Tribunal and thereafter by the Parties if they so wish, and that the scope of questioning by the Parties will in any event be limited to issues covered during the Arbitral Tribunal's questioning;

e) *With regard to Residual Matters*

- that if it transpires at the hearing that a Party has not had a sufficient opportunity to present its case, such Party will be at liberty to apply to the Arbitral Tribunal for such measures regarding the matters contemplated by this Procedural Order as the Arbitral Tribunal deems fit under the circumstances;

CONSEQUENTLY THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

A. With regard to Claimants' Request for Exclusion of Materials filed by Respondent with its Rejoinder

- 1. Claimants' request dated 12 May 2014 to exclude Exhibits RE-736.1, RE-775, RE-776 and RE-812 is granted. Said Exhibits are hereby excluded from the record and Respondent is invited to re-file an amended Rejoinder and updated consolidated list of Exhibits in electronic format by Friday 6 June 2014. Claimants' request as concerns the remainder of RE-736 (i.e. RE 736.2 to 736.34) is rejected and these Exhibits remain in the record.**

B. With regard to the Parties' lists of witnesses called for examination at the hearing

1. As concerns Respondent's requests:

(i) Cross-examination of Claimants' fact Witnesses

- **with regard to the cross-examination of individual Claimants, Respondent shall have the right to cross-examine the eight Claimants who submitted a witness statement (i.e., Abate, Alberti, Flagella, Nota, Pagliani, Pandolfo, Santi and Varone);**
- **these eight Claimants may be cross-examined by video-conferencing;**

(ii) Cross examination of Claimants' Experts

- **Respondent's list of experts as filed on 13 May 2014 and as modified on 20 May 2014 is hereby confirmed;**

(iii) Direct examination of Respondent's fact Witnesses and Experts

- **there shall in principle be no direct examination of witnesses and experts, unless otherwise justified by special circumstances;**
- **therefore, if Respondent considers that there are special circumstances justifying a departure from this principle, it shall file a written application by Tuesday 3 June 2014 listing witnesses and/or experts it wishes to examine directly and provide explanations as to the reasons why such direct examination is justified;**

- that, in case the Arbitral Tribunal admits one or more of these requests, Claimants (who originally did not call such witnesses or experts for cross-examination) will be allowed to cross-examine them, if they so wish;
- (iv) *Examination of Claimants who are not fact Witnesses*
- Respondent's request to examine individual Claimants who have not submitted any witness statements is hereby rejected;
2. As concerns Claimants' requests:
- (i) *Cross-examination of Respondent's fact Witnesses and Experts*
- Claimants' list of witnesses and experts as filed on 13 May 2014 and as modified on 20 May 2014 is hereby confirmed;
- (ii) *Direct examination of Claimants' fact Witnesses and Experts*
- In the case where Respondent would submit an application to conduct direct examination of its own witnesses or experts and if the Arbitral Tribunal grants such application, Claimants would be granted an equal right in accordance with the principle of equality of arms;
3. As concerns individuals whom the Arbitral Tribunal wishes to question during the hearing:
- the Arbitral Tribunal requires the Parties to produce the following individuals for questioning by the Arbitral Tribunal at the hearing:
 - (i) Mr. Ted Bloch, in his capacity as Respondent's expert;
 - (ii) Mr. Nicola Stock, in his capacity as representative of TFA within the meaning of ICSID Arbitration Rules 18 and 32(3);
 - the Arbitral Tribunal also requests the attendance of the following individual for questioning by the Arbitral Tribunal at the hearing:
 - (i) Dr. Norbert Wühler, in his capacity as Tribunal expert;
 - that these three individuals shall first be questioned by the Arbitral Tribunal and thereafter by the Parties if they so wish, and that the scope of questioning by the Parties will in any event be limited to issues covered during the Arbitral Tribunal's questioning.

4. As concerns residual matters:

- **At the end of the hearing, the Arbitral Tribunal will examine whether each Party has had a sufficient opportunity to present its case regarding the Phase 2 issues; each Party will be at liberty to apply to the Arbitral Tribunal for such measures regarding the matters contemplated by this Procedural Order as the Arbitral Tribunal deems fit under the circumstances.**

The decisions made in this Procedural Order have been made jointly by the majority of the members of the Arbitral Tribunal.

Dr. Torres Bernárdez has issued a separate 'Statement of Dissent', which will be communicated separately.

[signed]

Pierre Tercier
President

On behalf of the majority of the Arbitral Tribunal